

TRIBAL COURT
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

CARTER McFALL,
Plaintiff,
v.

Case No. C-025-0101

VICTORIES CASINO, LITTLE
TRAVERSE BAY BANDS OF
ODAWA INDIANS,
Defendant.

*Ruling on Defendant's Motion
For Summary Judgment; AND
Ruling on Plaintiff's Motion
For Sanctions*

I. RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now this matter comes to this Court on Defendant's *Motion For Summary Judgment* based upon tribal sovereign immunity. Defendant filed the present Motion on July 01, 2002 arguing that this Court does not have subject-matter jurisdiction after this Court issued its written opinion in *Lonchar v. Victories Casino*, Case No. C-022-1200, on February 11, 2002. Oral arguments on the *Motion* were held on October 04, 2002.

MOTION ANALYSIS AND REASONING:

The instant case is substantially similar to *Lonchar*. This Court's analysis in that case regarding: tribal sovereign immunity under federal law, immunity of subordinate enterprises of the Tribe, effect of the Indian Civil Rights Act, and tribal sovereign immunity under tribal law applies to this case. The analysis, reasoning and holding of *Lonchar* is precedent for this case.

However, there are two (2) separate circumstances in this instant matter which must be addressed by this Court. The first is whether the representations in the Employee Handbook or those made by various casino management employees waived the inherent sovereign immunity of

the Tribe. The second is whether the Defendant waived tribal immunity by not raising it as an affirmative defense prior to the trial itself when the Court set a schedule for the presentation of affirmative defenses.

The Tribal Council of the Little Traverse Bay Bands of Odawa Indians is empowered to carry out the functions of tribal government. Only the duly-elected Tribal Council, as a whole, can waive the immunity to the Tribe. It cannot be waived by the Tribal Gaming Administration, which adopted the Employee Handbook, nor any of its employees because it is a subordinate enterprise of the Tribe.

The issue of sovereign immunity in the present action was not raised until Defendant's *Motion* dated July 01, 2002. Beginning with the pleading filed in this matter and through all the proceedings up through this Court's written opinion in *Lonchar*, this Court believed that cases ought to rise and fall based solely upon the merits of the matter and the arguments made to the Court by the parties. The Court's thinking was that it should not raise issues (i.e. claims and defenses) that were not raised by the parties themselves. In retrospect, it is now clear to the Court that a question regarding the Court's jurisdiction to hear a case should be raised by the Court if not raised by the parties. *Lonchar* makes it clear that it is a threshold question which must be addressed by the Court. Jurisdiction should be a primary concern to the Court.

Although this matter comes now to the Court on a motion which is captioned as a motion for summary disposition, which occurs before a trial/hearing, it is in reality a motion to dismiss based upon lack of jurisdiction. Lack of subject-matter jurisdiction can be raised at any time. It cannot be waived by the parties.

**FOR ALL OF THE FOREGOING, THIS COURT GRANTS
DEFENDANT'S MOTION TO DISMISS BASED UPON LACK OF
JURISDICTION.**

II. RULING OF PLAINTIFF'S MOTION FOR SANCTIONS

Plaintiff requests that the Tribe and its counsel be sanctioned, in the event the Court dismisses this action, for needlessly increasing the costs of litigation and for frivolous defenses.

The opinion in *Lonchar* was issued on February 11, 2002. Defendant filed the above-considered motion on July 11, 2002. Plaintiff argues that Defendant held back on asserting sovereign immunity thereby increasing the costs to the Plaintiff. Defendant argues that Plaintiff chose to be represented by out-of-town counsel and that tribal case law on tribal sovereign immunity changed dramatically with the release of the *Lonchar* opinion. The Court agrees with Defendant's assessment of the impact of *Lonchar*. Earlier cases reflected the Court's own perspective disfavoring the Anglo-American concept of sovereign immunity. *Lonchar* changed earlier case law within this Tribe.

**FOR ALL OF THE FOREGOING, THIS COURT DENIES
PLAINTIFF'S MOTION FOR SANCTIONS.**

10/22/02
DATED

Honorable Michael D. Petoskey
Chief Judge

TRIBAL COURT
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

CARTER McFALL,

Plaintiff,

Case No. C-025-0101

v.

Opinion After Remand

VICTORIES CASINO, LITTLE
TRAVERSE BAY BANDS OF
ODAWA INDIANS,

Defendant.

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OPINION AFTER REMAND

This matter comes to this Court on remand from the Tribal Appellate Court. Although the Defendant is immune from an award of damages, the Tribal Appellate Court has directed this Court to make findings of fact regarding whether Defendant violated any of Plaintiff's rights in the termination of Plaintiff's employment with the Defendant. Accordingly, this Court has completely reviewed the record in this matter, including listening to the hearing on the merits in its entirety.

COURT ANALYSIS AND REASONING

CONTEXT

This matter arises from a context that is critically important to a fair and just resolution. This proposition can not be overstated. Context is important for a full comprehension and understanding of both the circumstances and facts. In the matter before this Court, the context is

clearly described to the Court by both parties to this action. There is no dispute as to context. Although in the emotion of dispute, it is easy to lose sight of context, and thus a complete comprehension and understanding. Lack of a complete picture of events and their surrounding results in "keyhole analysis", i.e. an analysis that results from having only a part of the picture which further results in incomplete or inaccurate analysis.

As a backdrop to this matter, one must not forget that the Little Traverse Bay Bands, as a tribal government, and its enterprises are in their formative stages. It can not be denied that the reaffirmation of the political status of the Bands is a relatively recent event, having come less than ten years ago. Creation of the tribally-owned economic enterprises is even more recent.

Additionally, Plaintiff's termination occurred right at the time the grievance process for personnel matters was falling apart. This is a significant circumstance. Both parties argue that the process had "run amuck". It was so bad that it was completely abolished shortly after Plaintiff's termination. Both parties agree that these were both "difficult and tumultuous" times.

ANALYSIS

The ideal is always perfection. However, reality provides it own challenges to perfection. No human is perfect. Add a developing tribal government, a new gaming enterprise, individuals with strong opinions, and a grievance process running amuck during difficult and tumultuous times. Now, that is the reality of this situation.

It is clear from the testimony and the way he presented himself that Plaintiff was one of those who had strong opinions and acted accordingly. In fact, it is easy to see that he was a major contributor to the demise of the grievance process as it relates to him. All the witnesses testified that the grievance process had run amuck. A major factor contributing to a process out of control was how the process was being used. Usually employee grievance processes are designed to provide an employee an opportunity to contest a disciplinary action taken against that employee.

However, in the instant matter the process was being used to file everything from "petty complaints" to grievances for which that process was actually intended to address. It is clear that there was massive misuse of the system and that it had spun out of control. In this context, Plaintiff attempted to assert his will upon others by refusing "to accept" certain grievances. He thought that if a grievance did not make a "valid" complaint, the grievance should be rejected. Plaintiff took it upon himself to attempt to reject grievances he thought were not valid. It is clear that Plaintiff was unhappy about the number of grievances that had been filed against him. He was also unhappy that Human Resources was not sorting out frivolous grievances as he thought that they should. Thus, he decided that he would deny accepting them. Apparently, it never occurred to him that the sorting responsibility belonged exclusively to the grievance panel, not to Human Resources, him or anyone else and that the delivery to him was the Defendant's notice to him that a grievance had been filed against him, notice of the substance of the grievance and notice of his opportunity to respond. His actions were a contributing factor to the system spinning out of control.

Numerous defense witnesses testified that Plaintiff's management style and attitude were one of "my way or the highway". That attitude is corroborated by his actions in refusing to accept grievances filed against him. In fact, he testified that he only began to accept them after receiving a memo from gaming management to do so. His attempt to force his will on Human Services was intimidating. He was clearly frustrated as were, admittedly, others. Although the frustration is understandable, it does not excuse Plaintiff's actions which brought even more chaos into the situation. He was simply mistaken about who was responsible for sorting the valid grievances from the frivolous. Also, rather curiously, Plaintiff interjected into his testimony his self-professed strong opinion about tribal preference, although it had no relevance to any of the other testimony. It is transparent that Plaintiff views tribal preference as both a shield and a sword to impose one's views upon another. Another point that escapes Plaintiff's

comprehension is that "one is what one is". Plaintiff testified that he attended certain Gaming Administration Commission meetings "as a tribal member". He fails to realize that one is not just any other tribal member when one has a position within tribal government or its enterprises. However, this Court understands that many others also fail to understand that one can not divorce themselves of their "position" and be just like any other tribal member whenever it suits their purpose.

EMPLOYMENT ANALYSIS

The specific issue presented on remand is: Whether Plaintiff was wrongfully terminated? Defendant argues that Plaintiff was an at-will employee and as such could be terminated from employment at Defendant's will, or in the alternative, there was just cause for Plaintiff's termination. Plaintiff asserts that he could only be terminated for "just cause" and that Defendant did not have just cause to terminate his employment.

The beginning point for employment law analysis is employment at will. Today, most people disfavor employment at will because it provides no job security for workers. Most accept the notion that fairness requires some basic protections. Employment at will as a relationship between employer and employee is probably best suited for two kinds of employees, i.e. those that are merely temporary and those in higher level management positions.

"Employees have challenged unfair discharges with a variety of legal theories and gradually three 'exceptions' to the at will doctrine emerged: (1) breach of an express or implied promise, including representations made in employee handbooks; (2) wrongful discharge in violation of public policy; and (3) breach of the implied covenant of good faith and fair dealing." See *Employment Law*, Mark A. Rothstein et. al., West Publishing Co. (1994). Today, almost every state accepts at least one of these causes of action.

From this beginning point of analysis, a careful reading of the *Employee Manual* leads

one to the conclusion that the Defendant has implied that discharges will only be made for just cause, unless the infraction is so severe that the four-step disciplinary process must be foregone. The reading reveals that the "Conduct" section begins "...*Victories Casino follows the four-step approach to correcting conduct and corrective action*" (bold for emphasis by the Court). The next section entitled "GRIEVANCE PROCEDURE" begins by stating: "*It is the policy of Victories Casino to ensure that employees receive fair and equitable treatment.*" Furthermore, even the section entitled "Introductory Period" states "*Within this 90 day period employees can be let go for cause as determined by the manager*" (bold for emphasis by the Court). All of this taken together clearly implies that employment will only be terminated just cause.

It is also clear the Defendant reserved the right to summarily discharge an employee based upon the severity of the infraction. Defendant argues that the intimidating behavior of the Plaintiff, along with the cumulative impact of numerous grievance filed against him justified his terminated. In fact, that was the reason given for Plaintiff's discharge. The question for this Court is whether the alleged infractions by the Plaintiff were severe enough that he should be summarily discharged from employment.

It is important that management have sufficient latitude to manage without outside interference. Managers must have sufficient discretion to make decisions. After all that is what they are hired to do. They are the ones who are on the front lines. However, there must be adequate checks and balances. Good systems require management with good skills and practices. Was management lacking here? That is the question.

The evidence in matter was that there was one write-up in plaintiff's personnel file. It was for intimidating behavior. Plaintiff argues that the write-up should have been removed, but in fact it had not been removed. There was no other disciplinary action taken against Plaintiff. However, on the day that Plaintiff was terminated the grievance panel made recommendations regarding three (3) separate grievances filed against Plaintiff. There were about two hours

between each of the recommendations, i.e. a span of six hours. The first of these three recommendations was that Plaintiff receive and undergo management training, the second found him intimidating and recommended a written warning, and the third recommended his termination. It was upon this recommendation and a consultation with the Tribal Human Resources Director that Plaintiff was terminated by the interim casino manager.

In the instant matter, Plaintiff's situation was reviewed by the grievance panel, the interim casino manager, and the Tribal Human Resources Director, three separate entities in the management loop to provide checks and balances. All three concluded that Plaintiff should be terminated. The process certainly was not perfect, but it contained enough checks and balances to ensure fairness to Plaintiff.

Plaintiff asks this Court to award him damages for wrongful discharge. This Court does not find his discharge to be wrongful and is without power to award damages. Plaintiff also asks the Court to give him his job back. The Court finds it curious that Plaintiff also asked for damages to further his education because he can not get comparable employment outside of the Tribe. The logical extension of plaintiff's argument is that he does not have the skills for the job. In fact, the testimony presented by Defendant's witness did establish that Plaintiff did not have the management skills that were required of his position. After his departure it was discovered that there were virtually no management records, no files of permits pulled for construction projects, and no project records. Defendant's witnesses also testified that under Plaintiff's tenure that there were major mistakes in construction and the conversion of the facility from one for bowling to that of a casino. Plaintiff argues that this is mere pretext to justify Plaintiff's termination after the fact. The Court agrees, but it does have a direct bearing on whether this Court would be comfortable ordering the Tribe to reinstate Plaintiff to his former position. In light of the lack of appropriate management record keeping and the construction and remodeling

miscues which cost the Tribe significant amounts of money, this Court finds that Plaintiff would not be entitled to his job back even if the Court found his discharge wrongful.

**FOR ALL OF THE FOREGOING, THIS COURT DISMISSES
PLAINTIFF'S CLAIM OF WRONGFUL TERMINATION.**

11/24/03

DATED

MICHAEL PETOSKEY
TRIBAL JUDGE

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